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No. 94-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Thirteen copyright owners, all of them members of ASCAP, the music copyright licensing organization, brought this copyright infringement action against the operator of a hotel, alleging unauthorized public performances of the copyright owners' songs by a disc jockey performing in the hotel's lounge. The defendant did not dispute that the infringing performances had occurred. Instead, it sought to avoid liability by pleading two defenses, arguing first, that its infringing conduct was "innocent"; and second, that the First Amendment, combined with the *rationale* of this Court's decision in *Twentieth Century Music Corp. v. Aiken*, shielded defendant from liability for infringement by "passive inadvertent reception" of radio broadcasts played over the hotel's sound system. The lower courts rejected both defenses, leading defendant to petition this Court to address two issues:

I. Did the Court of Appeals correctly apply the proper standard for review of the district court's decision granting partial summary judgment for respondents on the issues of liability and the petitioner's "non-innocent" state of mind?

II. Did the Eleventh Circuit properly reject petitioner's novel First Amendment defense?

RULE 29.1 STATEMENT

Respondents are Perren-Vibes Music, Inc., Polygram International Publishing, Inc., Music Sales Corporation, Famous Music Corporation, Giorgio Moroder Publishing Company, Funky Metal Music, Polish Prince Music, Big Elk Music, Flyte Tyme Tunes, Hideout Records and Distributors, Inc., Age to Age Music, Inc., Edward Grant, Inc. and Yellow Elephant Music.

The parent company of Polygram International Publishing, Inc. is Polygram N.V. The parent company of Famous Music Corporation is Paramount Communications, Inc. Respondents have no other parent companies or subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Parties

Respondents are copyright owners who brought an action seeking relief under the Copyright Law, 17 U.S.C. §§ 101, 106(4), 501(a), 502(a), 504(c) and 505, for unauthorized public performances of their copyrighted musical works. Each respondent is also a member of the American Society of Composers, Authors and Publishers ("ASCAP"), the performing rights licensing organization. This Court's opinion in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,

441 U.S. 1 (1979), describes in detail ASCAP and its licensing activities. (C-1).[1]

Petitioner Inn of Miami, Inc. (the "Inn" or "petitioner") owns and operates a hotel that is open to the public and presents musical entertainment in its disco lounge. On May 24, 1991, the Inn provided such entertainment by mechanical means -- a disc jockey played records amplified over the Inn's sound system and tuned in a radio receiver that retransmitted broadcasts of music over the same sound system. (C-3, ¶¶ 3-4). The radio receiver was a fully integrated component of the Inn's sound system, which also employed six speakers placed twenty feet apart around the lounge's dance floor, was capable of playing videos in synchronization with musical performances, and had public address capabilities. The music was audible throughout the approximately 5,000 square foot area of the lounge. (C-7, ¶ 16, E-2).

Pre-Litigation Dealings between ASCAP and the Inn

Prior to December 31, 1988, the Inn held an ASCAP license agreement which authorized the public performance of all music in the ASCAP repertory at the Inn. That license expired by its terms on December 31, 1988. (C-4, ¶ 6).

Since that time, the Inn has not been licensed by ASCAP. Through correspondence and other contacts, ASCAP explained the need for an ASCAP license or permission obtained directly from the copyright owners, and advised of the consequences of performing copyrighted music without such authorization. Typical of those communications is ASCAP's letter of October 22, 1990 in which ASCAP explained the benefits of its license, advised of its "editing service" available to assist music users who wish to know whether specific songs are in the ASCAP repertory, and warned of potential liability for the unauthorized public performance of copyrighted music. (C-4, ¶¶ 7-8). Petitioner refused all of ASCAP's license offers. (C-4, ¶ 9).

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[1] References are to the appendix to the petition for a writ of certiorari.

Eventually, two independent investigators engaged by ASCAP visited the Inn's disco lounge on May 24, 1991, and heard performances of the respondents' songs as part of the evening's entertainment which featured dancing. This litigation ensued.

Prior and Related Proceedings

The District Court

On February 16, 1993, respondents moved for summary judgment. The evidence of copyright infringement was undisputed (E-1-3-4-9). However, the Inn disputed the propriety of the relief sought (E-4), arguing that its infringing performances were "inadvertent" and "innocent," not "willful," thereby requiring an award of minimum statutory damages ($200 per infringement pursuant to 17 U.S.C. § 504 (c)(2)).

By Order filed April 9, 1993, the district court granted partial summary judgment on the issue of liability and rejected the Inn's claim of innocence (E-1-3-4-9), holding that the Inn had failed to sustain its burden of proving that its conduct was "innocent." Citing the specific language of 17 U.S.C. § 504(c)(2) -- the requirement that to justify a finding of "innocence," it must be proven that the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. . . ." -- the court concluded that, based on

> . . . *the undisputed evidence, the Inn's belief in its innocence was not reasonable.* In essence, the Inn claims that its upper management ordered the Inn's manager to cease playing ASCAP's music, but the music was played nonetheless. However, the Plaintiffs point to the testimony of Richard Wilbourn, the chairman of the Inn Serve Corporation, which indicates that the Inn did not monitor its policy. (Wilbourn Dep. at 18, 21.) *They have also submitted ample evidence that the Inn had notice of their potential copyright infringement.* Since March, 1989, ASCAP notified the Inn of the possibility of

> infringement by several letters and phone conversations spanning nearly two years. (DeRosa Aff. ¶¶ 11-14.)
>
> *Considering this evidence, the Inn's behavior constitutes not innocence, but indifference. . . .*
>
> * * *
>
> . . . Although a downward adjustment is unreasonable, the Court is unwilling to fix the damages from the parties' filing. . . . Considering the mixed record, the Court cannot determine whether the Inn acted "willfully." Such a finding is not required for the damages the Plaintiffs seek, *see* 17 U.S.C. § 504(c)(1), or for an award of attorney's fees, *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 853-54 (11th Cir. 1990) [footnote omitted]. However, it is helpful in the determination of both. *See id.*

(E-6-7-8) (emphasis added).[2]

Accordingly, the court reserved ruling on the issue of relief pending an evidentiary hearing. (E-9).

The case was tried to the court on April 15, 1993. That same day, the Inn filed its answer to the amended complaint, asserting for the first time at the trial, among other affirmative defenses, that (1) its radio-over-loudspeaker uses were not "performances" under the Copyright Act; and (2) it had a First Amendment right to rebroadcast respondents' copyrighted songs over its radio-over-speaker system. (C-2, E-3). The district court considered and rejected both defenses and concluded that "[a]lthough the Defendant's behavior was not entirely 'willful,' it was not 'innocent,' either." (C-13, ¶ 13). Accordingly, the court awarded respondents minimum statutory damages of $4,000 ($500 per infringement) pursuant to

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[2] As the district court noted, the Inn's president, Mr. Wilbourn, is also a practicing attorney. [C-3, ¶ 3].

17 U.S.C. § 504(c)(1) and their costs, including attorneys' fees of $22,617.08 (D-2).

In his findings and conclusions, the trial judge recognized that he faced the narrow issue of determining whether the specific requirements of the Section 110(5) exemption were applicable to the Inn's radio-over-speaker system. On the basis of the relevant statutory language, the legislative history, and cases interpreting the scope of § 110(5), the court concluded that the Inn's radio-over-speaker performances, as a factual matter, exceeded the limits of the Section 110(5) exemption. (C-9-11, ¶¶ 5-7). The court also found that the music was used by petitioner as ". . . an attraction of its own right," as shown by its dance floor alone. Thus, the court found:

> Considering [*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)] as the applicable standard, the Defendant's performances exceed the outer limit of the home systems exemption. The reports of ASCAP's investigators reveal that the Defendant's radio broadcasts were played over a sound system including two speakers mounted above four large box speakers, about twenty feet apart on opposite ends of a dance floor. The sound system is thus larger and more complex than the one in *Aiken. See U.S. Songs [v. Downside Lenox, Inc.]*, 771 F. Supp. [1220 (N.D. Ga. 1991)] at 1227 (describing similar cases in which restaurant sound systems exceed the home system exemption). *Furthermore, unlike the radio in Aiken, Inn's sound system is the center of the lounge's activity. The dance floor alone tells as much. It bears witness that the lounge's music was not background to the din, but an attraction of its own right. Consequently, the lounge's original sound system does not stand within the home systems exemption.*

(C-10, ¶ 7) (emphasis added).

Similarly, the trial judge had no difficulty, based on a "legion" of cases, rejecting the Inn's constitutional argument that the application of the Copyright Law to its infringing

performances by means of the radio-over-speaker system in its disco lounge area violated First Amendment rights. The court concluded:

> In its affirmative defenses and at trial, the Defendant also asserted a constitutional right to perform the Plaintiffs' compositions using amplified radio broadcasts. But the Defendant has not offered law to support this proposition, and opinions to the contrary are legion. "It has long been settled in our jurisprudence that the rights of free expression, embodied in the First Amendment and other legal doctrines, are subject to rights under the copyright and trademark laws." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 375 (S.D.N.Y. 1976), *aff'd*, 604 F.2d 200 (2d Cir. 1979). The power of Congress "[t]o promote the Progress of Science and useful Arts" is itself embodied in the Constitution. U.S. Const. art. I, sec. 8. Consequently, the Court rejects this defense.

(C-11, ¶ 8) (emphasis added).

The trial court also revisited the issue of petitioner's conduct, rejecting again the defense of "innocence" on the basis of the evidence adduced at trial -- including the extensive trial testimony of petitioner's officers and employees, as well as ASCAP's District Manager. The trial judge stated:

> The Court has determined and remains convinced that the Defendant's behavior "constitutes not innocence, but indifference." Order of Apr. 9, 1993.

(C-12, ¶10, C-13, ¶13).

The Court of Appeals

The Inn asked the court of appeals to reverse on the grounds that: (1) the trial court failed to consider fully the innocent nature of its conduct and thereby erred in failing to reduce the award of statutory damages; (2) the application of the Copyright Act in the circumstances of this case would

create a "chilling effect" and offend the First Amendment; and (3) the trial court abused its discretion in its determination of the attorney's fee award.[3]

Rejecting the Inn's "innocence" defense, the court of appeals concluded:

> In order to sustain a finding of innocent infringement, the Inn was required to establish that it "was not aware and had no reason to believe that [its] acts constituted an infringement of copyright. . . ." 17 U.S.C. § 504(c)(2). The record in this case amply supports the district court's rejection of the defense of innocence.

(A-2).[4]

Similarly, the court of appeals rejected the Inn's First Amendment defense as "without merit":

> The Inn's argument that the application of the copyright law to its infringing performance violates the First Amendment is without merit. In these circumstances, the First Amendment is subject to rights under the copyright laws. We held in *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990), that "[w]ith respect [sic] copyright protection

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[3] The petition for a writ of certiorari is silent with respect to the issue of the award of costs and attorneys' fees (and the additional attorneys' fees allowed by the Eleventh Circuit as part of the costs of the appeal), so we need not discuss the point further.

[4] The court of appeals effectively approved the trial court's exercise of its discretion in denying the Inn's request for minimum statutory damages of $200 per infringement. As the drafters of Section 504(c)(2) wrote: "The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringement is innocent." H.Rep. No. 94-1476, 94th Cong., 2d Sess. at 162 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5778.

> '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property.' *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

(A-2-3).

Related Proceedings in the Federal Courts

This Court should be aware that ASCAP members filed an earlier action for copyright infringement against the corporate owner of the Inn of Hammond in Hammond, Louisiana. This is a related business entity -- Mr. Wilbourn is the principal owner of that corporation. *Jobete Music Co., Inc. v. Inn of Hammond, Inc.* No. 91-2058 (E.D. La. Feb. 7, 1992). That action resulted in entry of judgment for the plaintiff-copyright owners. The judgment was affirmed, *per curiam*, and without an opinion by the Court of Appeals for the Fifth Circuit. *Jobete Music Co., Inc. v. Inn of Hammond, Inc.*, No. 92-3364 (5th Cir. March 19, 1993). And, there is currently pending in the Southern District of Florida a second action against the Inn's successors-in-interest, Hernando Realty Corporation and Inn Serve Corporation, 93-710-CIV-KING (S.D. Fl. 1993), also alleging infringement of ASCAP members' copyrighted music.

On this record, and for the reasons stated below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW ACCORDS WITH THE DECISIONS OF OTHER CIRCUITS ON THE APPLICABLE STANDARD OF REVIEW OF A DISTRICT COURT'S DECISION ON A MOTION FOR SUMMARY JUDGMENT

A. The Eleventh Circuit Correctly Applied the Proper Standard of Review

The court of appeals applied the proper standard for reviewing the district court's decision granting partial summary judgment for respondents on the issues of liability and whether petitioner's conduct was "innocent." The Eleventh Circuit has succinctly stated the basis for appellate review: "Appellate review of a grant of summary judgment is plenary, and we must apply the same legal standards used by the district court." *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 841 (11th Cir. 1990). (citations omitted).

The plain language of Rule 56(c) mandates the entry of summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). This Court explained:

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510 (emphasis in original).

Here, there was no factual issue as to liability so that the district court was correct in granting partial summary judgment on the issue of liability, and rejecting, as a matter of law, the defense of "innocence," based on *undisputed* factual evidence. This left for trial only the issue of appropriate relief and, as a corollary, the "willfulness" of the Inn's conduct. The district court correctly found, as a matter of law, that the Inn's conduct constituted "not innocence but indifference." Implicit in the court's summary rejection of the "innocence" defense was its conclusion that the issue sought to be created was simply not genuine.

Contrary to petitioner's assertion, the court of appeals examined the facts and the underlying claims, and, on the basis of the entire record, was satisfied that no factual issue existed as to liability. In consequence, the Eleventh Circuit agreed with the court below that plaintiffs were entitled to judgment as a matter of law and correctly affirmed the decision.

Petitioner errs in arguing that the Eleventh Circuit applied an improper standard for reviewing the trial court's determination of the issue of its innocence. The district court's finding after trial that the Inn's behavior constituted "not innocence but indifference" may not be upset unless it is "clearly erroneous." *Cable/Home Communication Corp. v. Network Products, Inc.*, 902 F.2d at 852-54. This required the court of appeals to look at the entire record before the district court -- precisely what the court of appeals did. It would have been extraordinary if the Eleventh Circuit had failed to consider that record, especially when the undisputed evidence clearly established petitioner's liability for copyright infringement, and "amply support[ed]" the lower court's rejection of the defense of innocence as a matter of law.

B. The District Court Was Abundantly Fair In Its Determination of the Issue of Innocence

Petitioner also argues that it was "impermissibly prejudiced" by the summary disposition of its "innocence" defense, claiming that "[e]vidence of 'inadvertence' may have risen to the level of proof of 'innocence' had it been permitted to

complete its proof at trial and had the trial judge been permitted the opportunity to assess the demeanor and credibility of crucial witnesses." (Petition, pp. 20-21). This argument misstates the facts.[5] Petitioner did indeed complete its proof at trial, and the trial judge's conclusions *after trial* were based on his evaluation of the credibility of the witnesses' testimony, including Mr. Wilbourn himself. Effectively, therefore, petitioner had two bites at the "innocence" apple at the trial court level.

Finally, as to petitioner's argument that the "disposition of the defense of innocence by summary judgment" was "premature," (Petition, p. 23) we merely note that other district courts in virtually identical cases have summarily disposed of an infringer's factually unsupported claims of "innocence," or a good faith belief that the conduct was non-infringing. *See, e.g., Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1039-40 (D. Mont. 1990).[6]

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[5] The district court, never "made a 'determination' of inadvertence as opposed to innocence" (Petition, pp. 19-20). Rather, as quoted above, the district court, on two separate occasions, found that "the Inn's behavior constitutes not innocence, but indifference."

[6] Other cases in which the courts have rejected the "innocence" defense on ASCAP's members' motions for summary judgment include *Tempo Music, Inc. v. Christenson Food & Mercantile Company,* 806 F. Supp. 816 (D. Minn. 1992) (defendant admitted liability, but opposed summary judgment on the issue of relief, claiming that he was entitled to a hearing on the issue of "innocence." The Court denied his request, granted plaintiffs' motion and, without a hearing, awarded greater than minimum statutory damages and attorneys' fees); and *Little Mole Music v. Spike Investment, Inc.*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) (liability was uncontested so the court ordered an evidentiary hearing only to resolve the issue of relief. The court stated that "mere non-deliberate infringement is not 'innocent;' rather defendants must have 'acted in complete ignorance of the fact that [their] conduct might somehow infringe upon the rights of another party' (citation omitted)").

In its brief, petitioner admits that "case law supports" summary disposition of the "innocence" issue. (Petition, p. 23). But, petitioner's reliance on the *Hickory Grove Music* decision, 749 F. Supp. at 1039, is misplaced

(Footnote continued)

II.

THE FACTUAL HOLDING OF THE COURTS BELOW PRESENTS NO QUESTION OF GENERAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

A. The Lower Courts Properly Refused To Apply *Aiken*'s Reasoning To This Case

Petitioner argues that the decisions below should be reviewed because they "conflict with *Aiken*" and reject its reasoning. This argument is flatly wrong because Congress overruled *Aiken* and explicitly rejected the rationale of that decision when it adopted 17 U.S.C. § 110(5), stating in the legislative history that the "*basis* for the *Aiken* decision is completely overturned by the present bill." (Emphasis added.) H.Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5700-01. *Cf. Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1990), *aff'd*, 949 F.2d 1482, 1487-89 (7th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1995 (1992).

As to petitioner's assertion that the court below should have, but did not, address "whether [the First Amendment underpinnings of] *Aiken* ha[ve] survived [the 1976 Act]" (Petition, pp. 6, 8-11, 16-18), the Eleventh Circuit correctly rejected petitioner's argument outright as moot and without merit, warranting no discussion. In addition, petitioner's reliance on the language in *Aiken* is misplaced. This Court's

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(Petition, p. 24). Contrary to petitioner's statement, damages there were *not* reduced, despite the evidence indicating a good faith belief in the applicability of the "home-style" defense. Nor was the issue of "innocence" determined after trial. Rather, by summary judgment motion, without an evidentiary hearing, the court awarded plaintiffs minimum statutory damages under Section 504(c)(1) for non-innocent, non-willful infringement. *See also Buck v. Jewell La Salle Realty Co.*, 283 U.S. 191, 198-199, 51 S. Ct. 410, 411 (1931) (neither lack of intent to infringe nor a good faith belief that conduct is non-infringing will excuse liability for copyright infringement).

decision in *Aiken* merely construed the statutory language, and never considered the constitutionality of the statute or its First Amendment implications. *See Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, at 1024, n.2 (W.D.Pa. 1983).

Even assuming *arguendo* that the basis of *Aiken* had not been "overturned" by Congress, petitioner may not rely on the reasoning or the result of *Aiken* for, as the district court correctly found -- and petitioner nowhere disputes -- its performances far exceed the "outer limit" of the § 110(5) exemption. (C-10, ¶¶ 6-7). *See* H.Rep. No. 94-1476, 94th Cong., 2d Sess. at 86-87 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5700-01. In this regard, it should be noted that petitioner misrepresents itself, its radio-over-speaker system and the purpose for which it used music when it analogizes itself to Aiken who, as this Court observed, merely turned on the radio to hear ". . .[m]usic, news, entertainment and commercial advertising," 422 U.S. at 152. The undisputed facts as to petitioner's performances, based on the trial court's decision, are that petitioner used the music as an attraction for its lounge's patrons, as distinct from the use in *Aiken*:

> . . . unlike the radio in [Aiken's fast food shop], Inn's sound system is the center of the lounge's activity. The dance floor alone tells as much. It bears witness that the lounge's music was not background to the din, but an attraction of its own right. Consequently, the lounge's original sound system does not stand within the home systems exemption.

(C-11, ¶ 7).

B. The Eleventh Circuit Correctly Rejected Petitioner's Novel First Amendment Defense Based on "Passive Inadvertent Reception"

Petitioner argues that when copyright owners enforce their right of public performance in cases such as this, they are violating the infringer's First Amendment rights by penalizing the infringer for "inadvertent passive reception" of radio broadcasts, thereby denying the public its right of access to

broadcast performances of news and non-copyrighted works in the public domain.[7]

This, says petitioner, would result in a "chilling effect" that would deter many from turning on the radio in order to avoid liability for infringement of copyrighted works. (Petition, pp. 13-16). The argument is indeed a novel one -- petitioner cites no authority for its application in a radio-over-speaker case under 17 U.S.C. § 110(5).[8] Surely, it is petitioner that seeks a radical departure from prior decisions when it urges this Court to resurrect *Aiken* and apply a radically new mode of analysis to cases under § 110(5).

But there is yet another reason for this Court to reject petitioner's invitation to consider a novel First Amendment defense in this case. The undisputed facts belie the argument

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[7] Petitioner's argument is not unlike the view of the defendants in *Robert Stigwood Group Limited v. O'Reilly*, 346 F. Supp. 376, (D.Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2nd Cir. 1976) who claimed that, under the First Amendment, "they have a free-speech right to express themselves through the lyrics and music of the plaintiffs." Judge Zampano disposed of that argument as follows:

> The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law. Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud, among many others, would constitutionally fall.

346. F. Supp at 382-83. This Court cited Judge Zampano's decision with approval in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 n.13 (1977).

[8] The cases all turn on the application of the statutory language to the particular sound system. *See, e.g., Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1990), aff'd, 949 F.2d 1482 (7th Cir. 1991), *cert. denied*, __ U.S. __ , 112 S. Ct. 1995 (1992); *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 760 F. Supp. 767 (E.D. Mo. 1991), *aff'd*, 954 F.2d 1419 (8th Cir. 1992), *cert. denied*, __ U.S. __ , 112 S. Ct. 1995 (1992); *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

-- the radio performances were anything but the kind of incidental use that might accompany a news broadcast. The Inn's disc jockey played a radio station whose broadcasts of music were suitable for disco dancing, and thus transmitted solely for entertainment purposes. It was for this reason that both courts below summarily rejected the applicability of the § 110(5) exemption, and the same logic should lead to rejection of the First Amendment defense.[9]

* * *

We can think of no more demonstrable waste of scarce judicial resources than petitioner's unrelenting efforts to relitigate yet again the issue of its innocence. Petitioner would have this Court grant the petition and then allow it at least one more opportunity to try to persuade the courts below of its innocence, even though the undisputed facts have already led the trier of the facts to a contrary conclusion. There never was a game less worthy of the candle.[10]

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[9] Petitioner misconceives the policies and purposes of the Copyright Law and the limits of the First Amendment. First Amendment rights do not include the right of piracy. *See Nimmer on Freedom of Speech*, § 2.05[C], p. 2-83 ("The First Amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker, and particularly at the expense of authors whose well-being is also a matter of public interest."); *Nimmer on Copyright*, § 1.10[A], p. 1.69-70; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 577, n.13 ("We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept [citations omitted]' "); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). ([I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression."); *McGraw-Hill v. Worth Publishers Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y 1971) ("Defendants' First Amendment argument . . . can be dismissed as flying in the face of established law").

[10] Simple economics demonstrates the futility of petitioner's case. Thus far, the district court has awarded respondents their costs and fees of $21,719.55. An application for additional attorneys' fees as part of the

(Footnote continued)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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costs of the appeal will be submitted shortly to the district court pursuant to the per curiam appellate decision. Even if petitioner were to succeed in reducing the damages owed from $500 per infringement to $200 per infringement -- a net reduction of $2,400 -- it would still be a recidivist infringer and would likely face the prospect of an award of yet more of plaintiffs' attorneys' fees.